© THE QUEEN'S PRINTER FOR ONTARIO
2000

REPRODUCED WITH PERMISSION

L'IMPRIMEUR DE LA REINE POUR L'ONTARIO

REPRODUIT AVEC PERMISSION

micromedia
a division of IHS Canada

20 Victoria Street
Toronto, Ontario M5C 2N8
Tel: (416) 362-5211
Toll free: 1-800-387-2689
Fax: (416) 362-6161
Email: info@micromedia.on.ca

EBR LITIGATION RIGHTS WORKSHOP MEETING REPORT

Based on a Workshop sponsored by
the Environmental Commissioner of Ontario on
May 25, 2000 at Macdonald Block, Queen's Park

TABLE OF CONTENTS

Background 1

An Introduction to *EBR* Litigation Rights Issues 1

Looking Back: Five Perspectives on *EBR* Litigation Rights 6

Moving Forward: Improving the Effectiveness of *EBR* Litigation Rights 12

Next Steps 19

Appendix A: Letter of Invitation and *EBR* Backgrounder

Appendix B: Agenda

Appendix C: List of Participants

102-01750/

Background

In 1994, Ontario's *Environmental Bill of Rights (EBR)* came into effect. Its passage provided Ontario residents with a commitment to safeguard the environment, to mechanisms for participation in government decision-making, and to the ability to hold the government accountable for environmental decisions made by ministries. The *EBR* also brought into existence two new distinct legal rights (Leave to Appeal and Right to Sue for Harm to a Public Resource) and enhanced two existing rights (Right to Sue for Public Nuisance and Whistleblower Rights).

In early 2000, the Environmental Commissioner of Ontario (ECO) decided to host a workshop to examine the effectiveness of the *EBR's* litigation rights. Invitations to attend the workshop and a backgrounder on *EBR* litigation rights were sent to a wide range of stakeholders. Fifty-six participants, representing private companies, ENGOs, labour unions and government ministries, attended the all-day workshop, which was held on May 25, 2000, at the Macdonald Block at Queen's Park. Appendices A, B and C provide copies of the letter of invitation, backgrounder, agenda and list of participants.

This meeting report has been prepared by the workshop facilitators (LURA Consulting) as a record of the event and is intended to convey its major themes, recommendations and outcomes.

An Introduction to *EBR* Litigation Rights Issues

Facilitator Joanna Kidd opened the workshop, welcomed participants and explained that the purpose of the workshop was to provide stakeholders with an opportunity to share their experiences with the *EBR's* litigation rights and their insights into the effectiveness of those rights. She then introduced the Environmental Commissioner of Ontario, Gord Miller, who provided opening remarks.

Opening Remarks

Commissioner Miller welcomed participants and noted the breadth of expertise and experience in the room. He briefly reviewed the experiences with litigation rights to date.

Since the *EBR* was proclaimed, the Leave to Appeal right has been used extensively. This provides citizens, in some situations, with the right to seek leave to appeal a ministry's decision on certain types of permits, licenses and certificates of approval. The Right to Sue for Harm to a Public Resource has been used to a limited extent. This provides the public with the right to sue someone who is breaking, or is about to break, a law when this contravention has harmed, or will likely harm, a public resource. The Right to Sue for a Public Nuisance has been used minimally. This allows someone experiencing direct economic or personal loss because of a public nuisance (e.g., interference with use and enjoyment of

land) to sue for damages or other personal remedies. The *EBR's* Protection from Employer Reprisal (Whistleblower) Right provides employees who report incidents such as discharges to the environment with protection from employer reprisals. This right has not been used at all in a formal sense but is likely acting in a preventive fashion. Commissioner Miller noted that all of the *EBR's* litigation rights were likely acting in a preventive fashion to improve environmental decision-making. He indicated that the staff of the ECO are interested in answers to a number of questions, such as those listed below:

- What experiences to date has the public had in using the *EBR* litigation rights?
- Is the use of the *EBR* litigation rights working as envisioned by the *EBR* Task Force in drafting these rights?
- Are these rights resulting in better environmental decision-making (directly or indirectly)?
- Are there additional measures that could be taken to support the use of these rights?
- Are there unnecessary barriers to using the *EBR* litigation rights?
- Is there a need for better education/public outreach to make people aware of these rights?

Commissioner Miller closed by thanking everyone for making it a priority to attend and anticipated that the event would be of significant value to the office of the ECO as well as the participants involved.

Staff Presentations

David McRobert, Background on Litigation Rights

Mr. McRobert provided some of the contextual background that led to the litigation rights workshop. The ECO has a statutory obligation to review the *Environmental Bill of Rights,* which it does through annual reports, special reports and other means. He noted that the *EBR* has been in effect for six years and there is now sufficient experience with its litigation rights for a meaningful review of them to take place. Finally, the workshop allows ECO staff to meet directly with stakeholders. Although they frequently deal with applications at an administrative level, ECO staff do not often get an opportunity to interact with those using or affected by the *EBR's* litigation rights.

Mr. McRobert noted that some initial forecasts of investigation and litigation activities under the *EBR* greatly overestimated their eventual use. In 1992, the Ministry of the Environment (MOE) projected that there might be as many as 200 applications for investigation and 60 lawsuits each year in the ministry alone, once the *EBR* was proclaimed. The experience to date has been quite different: there have been roughly 60 applications for investigations a year and only a handful of lawsuits in the six years since the *EBR* came into effect.

Mr. McRobert reflected on the intent of litigation rights as envisioned by the *EBR* Task Force. The Task Force saw these rights as a tool of last resort, with political accountability remaining as the primary means by which residents would hold the government accountable for its environmental

obligations. He reflected that this may have contributed to the relatively low usage compared to the forecasts of activity.

Karen Beattie, Leave to Appeal

Ms. Beattie began her presentation by noting that the *EBR's* Leave to Appeal (LTA) provision was intended to create a right only when a failure in the regulatory system was thought to have occurred: it was not intended to give opponents a "second kick at the can." The test for granting LTA has two components. The applicants must demonstrate that the action would lead to significant harm to the environment. The other component of the test has been described colloquially as the "insane director" test: the applicant must prove that "there is good reason to believe that no reasonable person… could have made the decision." She noted that many of the people involved with LTA felt that the test is relatively demanding and not easily met.

Despite the rather demanding test, Ms. Beattie noted that the success rate for LTA applications was reasonably high. Between late 1994 and March of 2000, 52 applications were made on 30 instruments granted by the Ministry of the Environment. All of these applications were brought to the Environmental Appeal Board (EAB). Of the 30 applications for Leave to Appeal, four were withdrawn, two were not filed, 16 were denied, and eight were granted. She noted that, looking only at the LTA applications that were filed in time and were not withdrawn before a decision was rendered by the Board, eight out of 24 applications were granted, meaning that one-third have been successful. She suggested that the strictness of the test has most likely led to a high rate of settlement in instances where LTA is granted.

From this analysis, Ms. Beattie suggested, one could make a number of conclusions. One conclusion is that the LTA provision is working. The second conclusion is that changing the test could change the outcomes. If the test for granting LTA were made easier, it could result in more filings, but it might lower the settlement success rate. Making the leave test more difficult, however, could discourage applicants from pursuing an application for LTA.

Ms. Beattie also noted that a number of procedural issues have come to the attention of the ECO. The 15-day period for filing applications has been characterized by users as being extremely tight. Perhaps because of the tight filing period, some very significant decisions have been posted that received no applications to appeal the decision. The 600-million-litre water taking permit awarded to the Nova Group was cited as an example.

Paul McCulloch, Right to Sue for Harm to a Public Resource

Two cases have used the *EBR's* Right to Sue for Harm to a Public Resource (RSHPR). These involved the impact of a landfill on the natural environment and the impact of a sewage treatment system at a ski resort on a local water body.

Mr. McCulloch noted that the RSHPR provision is structured in a way that makes it extremely difficult to use in order to prevent harm to a resource or the environment. He suggested that the provision is actually more likely to be used once an individual or company has contravened a statute and environmental harm has been caused. This, in part, flows from the nature of the test for RSHPR. To act on the RSHPR provision, two preconditions must be met. First, the defendants must have contravened, or be about to imminently contravene, a prescribed environmental statute, regulation or instrument. Second, the plaintiff must file an *EBR* application for investigation and must demonstrate that the government has failed to respond in a timely or reasonable manner.

Mr. McCulloch reviewed the statutory defences available to respond to an action and the remedies that might apply. There are three statutory defences: that the defendant had exercised due diligence; that the action was authorized through a regulation or instrument; or that the defendant was complying with a regulatory obligation. In terms of remedies, plaintiffs cannot be awarded damages, but the court may order a declaration, an injunction or a restoration plan.

As to why there have only been two RSHPR actions since 1994, Mr. McCulloch suggested that the defences may be too generous, actions may take too much time, and the cost to prepare an action may be too high.

Paul McCulloch, Right to Sue for Public Nuisance

Mr. McCulloch noted that the *EBR's* Right to Sue for Public Nuisance (RSPN) expanded an existing right. It allows an action to proceed more easily, notably by not requiring the consent of the Attorney General. Those seeking to take action, however, need to prove that they have suffered some direct economic or personal loss. He noted that the remedies that could flow from a public nuisance action initiated under the *EBR* were the same as any other lawsuit in the courts.

The case history with RSPN is limited, but nonetheless illuminating. Two cases have arisen and both have taken the form of class action lawsuits, one involving contaminated municipal drinking water and the other, a landfill site. Mr. McCulloch noted that the latter case was proceeding on to the Supreme Court and that the outcome of that case could be significant in terms of public nuisance and class action litigation.

David McRobert, Protection from Employer Reprisals

Mr. McRobert noted that the *EBR* expanded the existing whistleblower rights that has existed since 1983 under the Ontario *Environmental Protection Act*. Under the *EPA*, whistleblower rights could apply to activities governed by certain statutes such as the *Ontario Water Resources Act* and the *Fisheries Act*. Under the *EBR* provision, the right was expanded to apply to all Acts under the *EBR*, including the *Crown Forest Sustainability Act* and the *Gasoline Handling Act*.

Mr. McRobert suggested that the *EBR*'s expanded whistleblower provisions are probably working in a manner that may not be readily apparent or easily measured. For example, there have been reports of lawyers advising corporate clients against exercising reprisals against employees who "blow the whistle" because of the protection afforded them under the *EBR* and *EPA*.

As for litigation or actions involving the whistleblower provisions, Mr. McRobert noted that none have occurred under the *EBR* process. Between 1983 and 2000, however, there were five instances where the *EPA* whistleblower provisions were exercised. Most of these cases, he noted, were settled by the Ontario Labour Relations Board. He suggested that the lack of formal use of the *EBR's* whistleblower provision relates to the adoption of other whistleblower policies and the encouragement of whistleblowing in many progressive workplaces.

Looking Back: Five Perspectives on *EBR* Litigation Rights

Joanna Kidd introduced the five panelists and provided a brief background to the panel discussion. Panelists had been asked to speak for about ten minutes on their experience with the *EBR's* litigation rights, with an emphasis on what in their opinion works well, what doesn't work well, and any lessons that have been learned.

Jerry DeMarco, Sierra Legal Defence Fund

Mr. DeMarco began by stating that the Sierra Legal Defence Fund (SLDF) prefers to use private prosecutions or judicial reviews rather than the *EBR's* Right to Sue for Harm to a Public Resource. Four of five prosecutions undertaken by SLDF could have been done under the *EBR*, but were not.

Mr. DeMarco identified a number of limitations that he felt hampered the use of the *EBR's* Right to Sue for Harm to a Public Resource provisions. These include:

- the need to show that the government has failed to respond to the application for investigation in a timely or reasonable manner;
- the expansion of due diligence ("reasonable interpretation");
- the broad power to dismiss actions;
- the potential for high costs awards;
- the costly and slow nature of civil litigation;
- the lack of damages; and
- the need to prove "significant harm."

He also identified a number of advantages to the Right to Sue for Harm to a Public Resource. These include:

- a lower standard of proof (balance of probabilities) than is required in a criminal proceeding (reasonable doubt);
- the availability of a discovery process; and
- the ability to get injunctive relief.

Mr. DeMarco wrapped up by saying that he believed that there is a need for a last resort option (a Right to Sue), but that SLDF would continue to use private prosecutions rather than the *EBR* litigation rights until the financial, legal and procedural barriers are removed. He cautioned, however, that this would require amending the Act itself, which he believed should not be opened up at this time.

Doug Hatch, Artemesia Waters Ltd.

Mr. Hatch described the process that was followed by Artemesia Waters Ltd., the proponent in the Leave to Appeal by Felske, Noble, Holmes and Anders. Artemesia applied to the Ministry of the Environment for a permit to withdraw water from the Rocky Saugeen River for commercial water bottling. MOE granted a permit to take water and posted it on the *EBR* Registry. Artemesia carried out technical studies and public consultation on the issue both before and after receiving its permit. During the public comment period, which was extended to 2 ½ months, 2,145 comments were received on the application and Felske, Noble, Holmes and Anders brought their application for Leave to Appeal. The concerns raised by the plaintiffs included potential impacts on fish habitat, loss of flow in the river, reduction in aesthetics and whether the *Ontario Water Resources Act* was inconsistent with the *Constitution Act*. At the hearing, Artemesia focused on presenting technical evidence in support of its application and the "reasonableness" of the ministry's decision. The Environmental Appeal Board denied the application for Leave to Appeal and found that the ministry's decision was reasonable, having regard to relevant laws and policies.

Mr. Hatch suggested that there were some procedural issues that he felt needed to be addressed. The opinion of the MOE experts was not made clear until their affidavits were filed at the Board hearing. He suggested that because of the test for Leave to Appeal, credible evidence on the risk to the environment is essential in these applications and consequently the application for leave needs to focus on presentation of qualified expert evidence. He also noted that many of the socio-economic concerns that were tabled by commenters on the *EBR* Registry with respect to the water taking permit were not related to the technical information (i.e., effects on the natural environment).

Laura Nemchin, Ontario Ministry of the Environment

Ms. Nemchin grouped her comments into procedural and substantive issues. Overall time lines were a concern, in her opinion, for the ministry as well as applicants. The tight time lines for making applications for Leave to Appeal, for example, mean that applications are often not as complete or polished as they could be. She suggested that there was not a lot of guidance for applicants and proponents as to what is expected in applications and responses. This leads to inconsistencies (e.g., some applications were two-page letters, others were large volumes containing affidavits). Guidance, perhaps from the Board, would be useful with respect to the standard of proof, disclosure and reply. She also noted that all the hearings now were "paper hearings," and raised a question as to whether there should be an option for oral hearings.

In terms of substantive issues, Ms. Nemchin suggested that the *EBR's* Leave to Appeal provisions have given a voice, albeit not a loud one, to third parties in environmental decision-making. The existence of Leave to Appeal makes the government pay close attention to its actions, especially when applications for leave are made. The *EBR* and its litigation rights provide a mechanism for starting dialogues between

the ministry and third parties, and between proponents and third parties. This was evident in a recent case involving a quarry application, in which mediation triggered by an *EBR* application resolved a 20-year-old dispute.

Linda Pim, Federation of Ontario Naturalists

Ms. Pim introduced herself as a "citizen survivor" of the *EBR*'s Leave to Appeal right and spoke about her experiences as one of a coalition of groups and individuals who had successfully sought Leave to Appeal. The application challenged an order concerning the use of Dombind as a dust suppressant on rural roads. Dombind, stated Ms. Pim, is a water soluble industrial waste containing significant amounts of dioxin and is extremely toxic to aquatic life. The applicants were granted partial Leave to Appeal on one of seven grounds, specifically whether the conditions and requirements of the order issued by the ministry provided an adequate means of enforcement. The applicants argued that, because one party (Domtar) generated the waste and another (local municipalities) would apply it, the order failed to provide an adequate enforcement mechanism. Being granted partial Leave to Appeal gave the applicants leverage to effect a settlement with Domtar.

The outcome of the process, said Ms. Pim, was that the groups and individuals were better off than before, but possibly a judicial review might have achieved more. She noted that the settlement achieved was only an interim settlement because MOE intends to end the use of Dombind as a dust suppressant in 2001. One of the lessons learned was that there was considerable work entailed even after the settlement was signed and agreed to by the Environmental Appeal Board. This includes enforcing and monitoring the terms of the settlement (such as the need for maps at a certain scale), monitoring the other provisions of MOE's order for which the applicants weren't granted Leave to Appeal, and making sure the public has information on Dombind. In this case, she pointed out, the *EBR* process did not improve dialogue between the applicants and the proponent, and applicants had received letters threatening libel suits.

Ms. Pim noted that the applicants needed to have a lawyer for this application (they were represented by the Sierra Legal Defence Fund). She noted that of the eight cases in which Leave to Appeal was granted, in whole or in part, six were represented by lawyers. She finished by suggesting that intervenor funding should be made available to applicants for Leave to Appeal.

Rick Lindgren, Canadian Environmental Law Association

Mr. Lindgren began by saying that he believed that third party appeal of government decisions is useful and has made a difference in some cases (i.e., the Barker case in which a certificate of approval to operate a landfill site was revoked). However, he stressed the low rate of success—in 66 per cent of applications, leave was not granted—as an indication that Leave to Appeal had some significant problems. His presentation focused on the shortcomings of the current Leave to Appeal provisions.

The leave test, argued Mr. Lindgren, is too stringent and excessively onerous for applicants. The draft version of the *EBR* had no leave test, but found its way into the legislation. He favoured amending the legislation to drop the test altogether or revising it so that the presumption is in favour of granting the appeal. He also suggested that the Environmental Appeal Board, through its rulings, may be able to "massage" the test. Mr. Lindgren suggested that the Board should use a "whiff test" to decide if there is a triable issue, and leave judgments to the hearing.

With respect to the timing for Board submissions, Mr. Lindgren argued that 30 days is too short and can lead to rushed decisions. He suggested that there should be no time limit on the length of time it takes the Board to review a case, just as there is no limit on the time for court cases.

With respect to the nature and extent of evidence, Mr. Lindgren argued that it was unrealistic to expect top quality applications for Leave to Appeal in 15 days. He also suggested that affidavits were not necessary and would tend to overly formalize the process and force the use of lawyers. Mr. Lindgren argued that he didn't believe the Board has the right to award partial leave. He suggested that the Board should accept or reject applications for Leave to Appeal, and then go to the hearing to consider the merits of the application.

Mr. Lindgren also argued that applicants should have the Right of Reply to ministry and proponent responses to their applications for Leave to Appeal.

Mr. Lindgren ended his remarks by stating that he felt that the Ministry of Natural Resources list of prescribed instruments was long overdue, and that perhaps the ECO should issue a special report on the issue.

Discussion

Issue: Litigation, Incentives and the EBR

Jerry DeMarco was asked whether expanding the use of financial incentives to apply to the *Environmental Bill of Rights* would promote more litigation activities. Mr. DeMarco indicated that, in the case of the SLDF, a financial incentive would not be an incentive as it is a not-for-profit charitable organization. The primary interest of the actions launched by the SLDF is to prevent or reverse environmental harm, not to obtain compensation. A financial incentive, however, might be an incentive for other types of organizations or for individuals.

Rick Lindgren added that if the *EBR* was to be reviewed, that it would be useful to rewrite the provisions under section 84 of the *EBR* (Right to Sue for Harm to a Public Resource) to allow for class actions to protect public resources. At present, the financial barrier to exercising these rights is quite substantial. Class action provisions currently apply only to the public nuisance rights of the *EBR*; if they

were extended to the Right to Sue for Harm to a Public Resource, more individuals and organizations could have the financial ability to launch public resource actions. In Mr. Lindgren's opinion, section 84 should permit class actions to help overcome the financial barriers to exercising this right.

Issue: The Effect of Comments on Decisions

A participant asked what effect comments posted on the Environmental Registry had on decisions, particularly with respect to the Ministry of the Environment and its permitting systems, and whether there had there been any analysis undertaken of the effect of comments on the *EBR*. Laura Nemchin responded that there had not been any analysis undertaken to her knowledge. She did mention, however, that decision-makers in MOE are very mindful of *EBR* postings and follow a formal procedure for reviewing comments on initiatives under their review. In summary, the Leave to Appeal provision has definitely had an impact on the way decisions are made within MOE.

Rick Lindgren suggested that there are often many useful comments posted regarding initiatives, but that the Registry has some shortcomings. Occasionally comments are made but the Registry posting provides no record of them. It also does not provide a very effective means of informing the public about the impact of their comments. Many decisions are posted indicating that the decision has gone forward as written or that the comments had no effect on the decision. It was noted by a participant that non-governmental organizations do attempt to monitor postings, forward them to appropriate parties and comment where possible, but these efforts are largely undertaken by volunteers. At one time, the Ontario Environmental Network had a staff person to monitor the Registry but that funding is no longer available. It was also suggested that the Ministry of the Environment appears to be proud of not having their decisions changed by comments from the public. Where decisions are amended, the ministry suggests that was the direction they were heading anyway. Finally, it was added that analyzing or measuring the impact of the Registry on decision-making would be a valuable exercise.

Issue: Formality of Process

A number of participants made comments on the formality of the Leave to Appeal process. While some formalizing or standardizing was generally felt to be necessary, most participants felt it should not be at the expense of "user-friendliness." One participant argued that while affidavits formalize the presentation of evidence, they also create barriers to the use of the *EBR* by citizens without legal knowledge or substantial resources. As well, they could make the process more legalistic for what is already a very tight time frame (15 days for Leave to Appeal). If confronted by affidavit evidence, some public interest intervenors indicated that they would need to bring in motions to strike out the affidavits.

Issue: Leave to Appeal Response Procedure and Time

A number of participants and panelists suggested that clarification is needed for information exchange in *EBR* actions. A possible route to follow would be the standard course of "Applicant-Response-Reply." Participants and panelists commented that the response time to file a Leave to Appeal application is limiting. With only 15 days to bring an application, responses will likely be incomplete. If information is

needed under Freedom of Information provisions, 15 days is not sufficient. While not advocating an overly formal process, the participant suggested that the Leave to Appeal procedure should be guided, standardized and user-friendly.

Issue: Dealing with Responses to EBR Postings

Doug Hatch was asked how Artemesia Water Ltd. managed the approximately 3,000 responses received to its *EBR* posting and whether the Ministry of the Environment contacted Artemesia's technical consultants. In terms of the responses received, Doug Hatch indicated he was aware of the vast majority of comments received, was able to glean the gist of them, and draw them into consideration when drafting a formal reply. With regard to the Ministry of the Environment contact, MOE did contact Artemesia and the company formally replied to both critiques received on its undertaking.

Issue: Test for Leave to Appeal

A number of panelists addressed the difficulty of the current test for Leave to Appeal. Jerry DeMarco suggested that the difficulty of the barrier was perhaps being overestimated, as there are two important qualifiers (there is "good reason to believe" and the decision…"could" result in significant harm to the environment). Ultimately, Mr. DeMarco suggested, more applications should pass the Leave Test.

Issue: Improving the Effectiveness of the Hearing Process

A final point made by a participant was that the effectiveness of the hearing process can't be meaningfully addressed without also addressing the steps that precede it. In particular, it was suggested that the process during the *EBR* comment period needs to work better, for example, through longer comment periods and better provision of information.

Moving Forward: Improving the Effectiveness of EBR Litigation Rights

According to their stated preferences, participants were divided into four small groups. Two of the groups addressed Leave to Appeal, one addressed the Right to Sue for Harm to a Public Resource, and the fourth addressed the Right to Sue for Public Nuisance and Whistleblower Rights. All groups were provided with facilitators and notetakers, and all were asked to address the following questions as they related to their particular Litigation Right.

- Is this Litigation Right resulting in better decision-making? Is it working as intended?
- Are there barriers to the use of this Litigation Right that limit its effectiveness?
- Are there measures that could help improve the effectiveness of this Litigation Right?

Leave to Appeal #1

Effectiveness of Leave to Appeal

Participants generally felt that the Leave to Appeal (LTA) provisions in the *EBR* have resulted in better decision-making, because decision-makers are more aware of the potential repercussions of their decisions. It has made decision-makers more careful in their preparation. The comment and appeal process also makes proponents more conscious of their actions. However, there is a perception that the new *EBR* consultation process has led to less consultation with communities than formerly took place. In some cases the LTA provisions may have falsely reassured municipal councillors that there is a safety net in case their decisions are faulty.

Barriers to LTA

Some of the barriers to LTA that were identified by participants include: the lack of funding for groups; onerous evidentiary requirements for LTA ("shouldn't have to prove the case in order to make the case"); and the likely need for legal counsel.

Another barrier that was identified was the lack of clarity from the EAB as to what they want to see filed by applicants and how it should be presented. Participants suggested that guidance from the Board on the procedures would be helpful—proponents would like a coherent argument so they can know the "four corners" of the applicants' concerns. Oral hearings might help.

A number of communication and accessibility barriers were noted. Participants felt that there were problems with the way in which posting was done on the Registry. Items are difficult to find and have incomplete information.

The LTA test itself was identified as a barrier. Some participants felt that the LTA test in s. 41 of the *EBR* is unclear and should be less wordy. Participants felt that a judicial review that might help clarify the test was unlikely, however. Other participants favoured keeping the LTA test as it stands.

Some participants disliked the concept of costs being introduced into the LTA process, feeling that it would have a chilling effect on potential applicants. They argued that accessibility is lost when fees are charged and costs awarded. Other participants argued that the tribunals should be able to control their processes and that powers to award costs serve this purpose. Another participant noted that powers to award costs are not the panacea that some believe, as tribunals end up spending time on many non-meritorious requests for costs.

Some participants raised the concern that under the *EBR*, public comment takes place before the ministry does its technical review of an application, e.g., an application for a permit to take water. Accordingly the public doesn't have a chance to comment on the ministry's review.

Another concern raised was the inability of citizens to appeal an instrument. Some participants felt that citizens should have the same right to appeal an instrument as the proponent.

Improving the LTA Process

It was suggested that the government should use Internet and computer technology more fully, for example, by posting the full text of instruments and underlying reports. This would result in a clearer, more transparent process. It was also suggested that postings should be made more accurate and useful, e.g., by providing phone numbers and contact names. The LTA and comment process would be more accessible if individuals could sign up for "push technology" and receive postings on specific subjects. It was noted that the government has security concerns about this, however.

Participants suggested that it would be helpful if the ECO came out with a detailed LTA Guide, which could include examples of successful LTA applications and materials filed. Some participants noted that the ECO should receive more resources in order to assist applicants with using the *EBR*, while other participants felt that funding should go directly to groups or into a Legal Aid model for assistance with obtaining notice, legal advice and technical advice and support.

Leave to Appeal #2

Effectiveness of Leave to Appeal

There was broad agreement among participants in this group that the LTA provision has resulted in better-drafted and more comprehensive instruments. Participants generally believed that more consultation is now undertaken by the ministry and more care is taken in drafting instruments so that terms and conditions are more precise and cover more issues. Despite this improvement in terms and conditions, a majority of participants felt that it is not clear so far if the LTA provision is affecting whether approvals are granted or not. There was agreement in the group that it is difficult to assess the impact of the LTA provision and that the ECO should call for better monitoring and measurement of its effects.

One participant noted that where leave is granted, third parties have more leverage for better decision-making. Another participant suggested that in some cases drafting of instruments may be less innovative and more traditional out of concern that the instrument may be appealed. Another member of the group added that the use of mediation to resolve issues related to an instrument under s. 34 of the *EBR* is a key provision that should be promoted irrespective of the LTA provision.

Barriers to LTA

A majority of participants agreed that the most significant barriers to use of the LTA provision are lack of money, lack of timely and complete information, unrealistic time lines, and lack of awareness. One participant stressed that comment periods are not long enough and alternative forms of consultation are rarely used. Another participant noted that MOE policies and guidelines may be difficult for lay citizens to understand. Members of the group discussed whether the LTA test is too difficult or whether the current Environmental Appeal Board interpretation makes it reasonable. A majority of participants felt that the current LTA time lines are entirely unrealistic.

Improving the LTA Process

There was broad agreement that effectiveness of LTA could be improved through public education, more meaningful consultation before instruments are issued, improved applications from proponents, and more flexible time lines. Some participants felt that more consultation would give citizens more information, which would assist in better Leave to Appeal applications and might also lead to fewer Leave to Appeal applications, because citizens would have enough information to better understand an instrument. It was suggested that directors should ensure that proponents consult with members of the public, and submit better applications for instruments. Most participants also agreed that there should be a possibility of intervenor funding or publicly funded lawyers, but noted that the LTA process should not be over-legalized. It was also felt by the majority of the group that the Environmental Appeal Board should clarify its process and be more user-friendly.

Right to Sue for Harm to a Public Resource

Effectiveness of Right to Sue for Harm to a Public Resource

Participants generally agreed that the Right to Sue for Harm to a Public Resource (RSHPR) is not having any impact on environmental decision-making. Although some participants felt that the very existence of the right was having an effect on the bureaucracy—they are aware of it and consider the possibility of an action being initiated—most believed this was not translating to a positive effect on the environment. Some participants cited the existence of only two RSHPR cases as evidence that it was not a practical threat for decision-makers. While the Harm to a Public Resource Action was intended to be used only as a last resort, it was the opinion of most participants that the possibility of bringing such an action was very remote and therefore did not serve the purposes of the *EBR*.

Barriers to RSHPR

The participants identified 10 barriers to the RSHPR:

- The costs of bringing an action are prohibitive. Problems cited include:
  - the cost of hiring a lawyer to see the case through to the end may reach $200,000;
  - plaintiffs cannot receive an award of damages to cover their own costs;
  - plaintiffs will not necessarily even recover their own costs if they win;
  - plaintiffs may have to pay the defendant's costs if they lose; and
  - if the plaintiff seeks an injunction, they may have to give an undertaking to pay the defendant's damages suffered as a result of the injunction if they lose.
- The test set out in the Harm to a Public Resource Action is too strict because the plaintiff must show both a contravention of a law and significant harm, not either.
- The term "significant" harm is too strong.
- The burden of proof is too high; plaintiffs should have to demonstrate only a *prima facie* case. Then the onus should shift to defendants to show that their action was reasonable and there was no other course of action.
- The requirement that plaintiffs must prove the ministry's response to the request for investigation is unreasonable is too onerous.
- The "reasonable interpretation" defence set out in section 85(3) is too broad.
- The *EBR* does not change the common law test for granting an injunction, which has generally not resulted in injunctions being granted in environmental cases in Canada.
- The power to issue a stay in section 90 of the *EBR* is too broad.
- The definition of public resource is too narrow (i.e., it only applies to public lands).
- Public awareness of the right to bring a Harm to a Public Resource action is low.

Some participants argued that, in sum, the barriers to bringing a Harm to a Public Resource action are so high that they constituted a "vortex of pain" for potential plaintiffs, and made use of the right virtually impossible.

Improving the RSHPR Process

Participants agreed that most of the barriers discussed above would require legislative amendments to change. Participants also agreed, however, that amending the *EBR* in the next few years would be both unlikely and unwise. Therefore, discussion focused on solutions that the Environmental Commissioner could implement that would promote this Litigation Right and resolve disputes.

Participants suggested that the ECO could:

- report on the results of applications for investigations immediately after receiving a ministry's response, not only in the annual report;
- publish a number of reports throughout the year on specific issues, rather than one annual report;
- get involved and act as an intermediary between disputing parties;
- appear as a friend of the court in other cases being argued; and
- help plaintiffs in preparing their cases.

Right to Sue for Public Nuisance

Effectiveness of Right to Sue for Public Nuisance

The group had mixed opinions as to whether the *EBR's* Right to Sue for Public Nuisance (RSPN) has led to better environmental decision-making. Those who felt that it has not led to better environmental decision-making suggested that this was due to the very low probability that potential sources of public nuisance would ever find themselves subject to a public nuisance action.

Those who believed that the existence of RSPN provisions had led to better environmental decision-making argued that it likely worked in a preventive fashion. Some argued that to be effective, RSPN had to be closely allied with class action legislation. An analogy was made to the act of transporting a person in a vehicle: public nuisance is the passenger, the *Class Proceedings Act* is the vehicle, and financial resources would be the fuel to put the provision in motion.

Barriers to RSPN

Participants noted two major barriers that limit the exercise of this right: cost and risk to the plaintiff. A participant suggested that it was unrealistic to expect a plaintiff to have access to a level of resources comparable to a defendant's. RSPN, they said, could be characterised as "more of a shield than a sword." In terms of cost, it was noted that though disbursement funding is available through the Office of the Attorney-General, it is difficult to access, and the fund may not be large enough to cover the expected amounts that may be claimed by plaintiffs and defendants.

In terms of financial risk, participants noted that there are considerable uncertainties associated with undertaking a RSPN action. Little is known about the likelihood of success of an action. In addition, the

size of any potential damage award may well be insufficient to warrant an action. Contrast was drawn between a public nuisance suit and a personal injury suit, in which damages could be in the hundreds of thousands or millions of dollars. Participants suggested that the settlements possible with personal injury suits make the risk of launching an action worth taking.

Another barrier cited was the "judicial knowledge" barrier. Some participants noted that many judges have never heard of the *EBR* or its public nuisance provisions. Furthermore, the public nuisance section could be seen as challenging a longstanding common law tradition and therefore the judiciary may be reluctant to use its provisions.

Improving the RSPN Process

Participants suggested that any measures that could reduce the barriers to using the RSPN would improve its effectiveness. Participants cited a number of ways in which the playing field could be levelled between the plaintiff and the defendant in terms of risk and cost. This could include instituting some form of intervenor funding and improving the size and accessibility of the Class Disbursement Fund. If legislative changes are made to the *EBR*, consideration could be given to going beyond compensating for financial damages, and section 103 of the *EBR* could be remoulded to protect a propertied interest. Participants suggested increased awareness and education as another way of improving the effectiveness of the RSPN, particularly with respect to the legal profession. A participant noted that corporate behaviour changes when insurance companies start to worry about causes of action as genuine risks. If large settlements were being awarded, organizations would begin modifying the behaviour that caused nuisances. This would result in better decision-making that reduced public nuisance in society.

Protection from Employer Reprisals - Whistleblower Right

Effectiveness of Whistleblower Right

Participants discussed the effectiveness of the Protection from Employer Reprisals (Whistleblower) Right within the context of many other environmental protection and worker health and safety measures and trends in society. Some participants believed that the *EBR*'s Whistleblower Rights provision was acting in a preventive, proactive fashion, as corporate and environmental counsel were advising their clients to avoid reprisals due to the existence of the provision. Others felt that it was not possible to know if the provision was working.

Participants suggested a number of reasons for the lack of formal use of the *EBR*'s Whistleblower Right provisions. These included the inclusion of similar provisions in some workplaces (e.g., unionized and progressive work environments) and the variety of avenues to pursue actions (e.g., collective agreements, Health and Safety Committees, contract negotiations, and meetings between union and management). Participants suggested it was more favourable to use proactive avenues in the workplace rather than legal avenues that were perceived to be more confrontational. In smaller, less formal and non-unionized environments, some participants felt that the situation may be potentially quite different.

In such environments, there may be less protection for employees and more ways that an employer can affect employees' actions.

Participants made a comparison with the experience of health and safety provisions. They noted that even in cases where personal health is at stake, employees often continue to tolerate the conditions for fear of losing their jobs. Refusals are seen as a last resort.

Barriers to the Use of Whistleblower Right

Barriers to the use of the *EBR's* Whistleblower Right provisions include lack of awareness of their existence. Representatives of public interest organizations noted that they focused less on this provision than on the others in the *EBR*. The perception of risk for the employee was raised as another barrier. This includes factors such as negative repercussions in the workplace. A third barrier cited was the time needed to reconcile a dispute: participants noted that an employee can be fired almost immediately but it could take weeks or months to formally settle a dispute through the Ontario Labour Relations Board. A final barrier to use of the Whistleblower Right provision is that the outcome might not justify the action. The employee would have to fund the litigation (possibly in the absence of a job) and wait for an indeterminate result. In some cases, the best possible result might be reinstatement with no financial or cost award.

Improving the Whistleblower Right Process

Participants suggested a number of legal, administrative, cultural and educational initiatives to improve the effectiveness of the *EBR's* employer reprisal provisions. In terms of changes, participants suggested that reprisals should be prohibited during the OLRB dispute resolution process. The process should be hastened so that decisions are made faster, while the episode is still relevant in the life of the wrongfully dismissed. As well, participants suggested that improving access to legal aid may support the use of this provision more broadly.

Some participants argued that the social atmosphere and workplace culture must be at least reasonably conducive to acting on these rights. A supportive society, government and workplace are essential ingredients to making this provision work. In the environment of down-sizing in the past decade, participants suggested that "bravery has to do with putting up and shutting up." Employees will view the *EBR*'s employer reprisal rights against the backdrop of government policy, the economy, and how much will there is to act.

Participants drew a comparison with other preventive or normative codes and legislation. The creation of human rights codes and sexual harassment policies has led to an environment in which few individuals feel it appropriate to discriminate or harass. A similar cultural change is needed for environmental transgressions. Participants suggested that impressing the need for environmental protection on the youngest in society may help ensure that fewer need to "blow the whistle" in years to come. *EBR* educators must also ensure that potential users of Whistleblower Rights fully understand the implications of using these rights.

Next Steps

Commissioner Gord Miller concluded the workshop by commenting on the great quantity and high quality of the comments and ideas put forward. Without trying to sum up or synthesize, he noted a number of suggestions were made very strongly. These included the possibility of expanding his own role, the need to examine the "front end" of the litigation rights processes, the need to make the mechanisms work better, and the significant deterrent of high costs.

The ECO, said Commissioner Miller, will be examining the outcomes of the workshop closely, and will be producing proceedings. The ECO will be focusing both on administrative changes that could improve the effectiveness of the *EBR's* litigation rights, as well as changes that might require amending the Act. The Commissioner cautioned that he was not planning to open up the *Environmental Bill of Rights*, nor was he aware of any proposals to do so, but that the ECO needed to be positioned to make recommendations if it were re-opened.

Commissioner Miller ended by thanking participants for their level of commitment and their valuable and timely input. After thanking panelists, facilitators and staff, he adjourned the meeting.

Appendix A

Letter of Invitation and *EBR* Backgrounder

March 31, 2000

Dear :

Re: *EBR* Litigation Rights Workshop

I would like to invite you to share your opinion on the litigation rights found in Ontario's *Environmental Bill of Rights* (*EBR*), and assist me in my review of these rights. I am hosting a workshop on the topic of litigation rights under Ontario's *EBR*, taking place on May 25, 2000, from 9:00 a.m. to 4:00 p.m. in the Temagami Room of the Macdonald Block at Queen's Park in Toronto, Ontario.

The intent of the workshop is to provide participants with an opportunity to share their insights about, and experience with, the litigation rights provided for by Ontario's *EBR*. Specifically these include: Leave to Appeal, Right to Sue for Harm to a Public Resource, Right to Sue for a Public Nuisance and Protection from Employer Reprisals (Whistleblower Rights). How these rights are being used or not being used is of particular interest to the Office of the Environmental Commissioner of Ontario (ECO).

A draft agenda for the workshop and a backgrounder on the *EBR*'s litigation rights are included with this letter. An issues paper prepared by staff at the ECO will be forwarded to participants by the end of April. This issues paper will provide background information for the workshop discussions.

I would be pleased if you or another member of your organization could join us on May 25, 2000. To assist us with our planning, please R.S.V.P. to Mr. Greg Jenish at Lura Consulting before May 1, 2000 if you are able to attend (a fax-back form is included in this package). You may also contact Mr. Jenish if you have any further questions about the workshop.

Yours truly,

Gord Miller
Environmental Commissioner of Ontario
attachments

Backgrounder for the

Environmental Bill of Rights Litigation Rights Workshop

Ontario's Environmental Bill of Rights

Ontario's *Environmental Bill of Rights* (*EBR*) came into effect in 1994 and has, since that time, provided Ontarians with:

- a commitment to safeguard the environment;
- a means to participate in government decision-making; and
- the ability to hold the government accountable for environmental decisions made by ministries.

Environmental Bill of Right's Litigation Rights

The *EBR* brought into being two new distinct legal rights and enhanced two existing legal rights:

- Leave to Appeal,
- Right to Sue for Harm to a Public Resource,
- Right to Sue for a Public Nuisance, and
- Protection from Employer Reprisals (Whistleblower Rights).

Collectively, these rights are referred to as the litigation rights because they enable members of the public to go to court or to an adjudicative tribunal to resolve disputes about environmental decision-making.

EBR Litigation Rights at a ***Glance***

Leave to Appeal: The *EBR* provides citizens, in some situations, the right to seek leave to appeal a ministry's decision on certain types of permits, licences and certificates of approval.

Right to Sue for Harm to a Public Resource: In certain instances, the *EBR* gives citizens the right to sue someone who is breaking, or is about to break a law and which has or will likely harm a public resource.

Right to Sue for a Public Nuisance: This *EBR* provision makes it easier for a person experiencing direct economic or personal loss because of a public nuisance (e.g. interference with use and enjoyment of land) to sue for damages or other personal remedies.

Protection from Employer Reprisals (Whistleblower Rights): An employee may know of, or have been forced to participate in, an incident involving spills, leaks or violations of environmental laws. This *EBR* right provides protection from employer reprisals for employees who report such incidents.

Frequency that Rights have been Exercised

Since the *EBR* was proclaimed, the Leave to Appeal right has been used extensively, the two right to sue rights (Right to Sue for Harm to a Public Resource and Right to Sue for a Public Nuisance) have been used minimally, and the Protection from Employer Reprisal right has not been utilized at all in a formal sense. However, all of these rights could be characterized as acting informally, in a preventative fashion.

Environmental Commissioner of Ontario's ***Review Obligations***

Under section 57 of the *EBR*, the Environmental Commissioner of Ontario (ECO) is required to review the public's recourse to the litigation rights (subsections (h), (k), & (l)). In past years, the ECO has fulfilled this obligation by including information in the annual reports (the "other legal rights" chapter in particular).

The ECO has also updated and published a paper on *EBR* rights, *The Nuts, The Bolts and the Rest of the Machinery*, which provides an overview of the *EBR* rights and how they have been used. However, this information has tended to be descriptive. To date, the ECO has not undertaken a thorough evaluation of the use of the litigation rights. Such an evaluation could be informative as to the types of action the ECO could undertake or recommend to improve the public's access to these rights.

ECO Review Initiatives

In order to fulfil the obligations set out in the *EBR*, the ECO has begun a more detailed evaluation of the *EBR*'s litigation rights. To date, this has involved two projects:

- the development of a discussion paper on the *EBR* litigation rights; and
- the planning and preparation for a workshop on litigation rights.

The paper on litigation rights has been completed and will be made available for public comment in April 2000.

The workshop is planned for May 25, 2000, and will bring together individuals who are active in utilizing the *EBR* and invite them to share their thoughts and concerns on how these rights are being used, or not being used. It will provide a forum to solicit a broad range of opinions and ideas on the role and effectiveness of the litigation rights.
The feedback received from the workshop and from the distribution of the discussion paper will provide a foundation from which the ECO can carry out its mandate to review the litigation rights. A second important function of these initiatives is to promote public education about the *EBR* by the Environmental Commissioner of Ontario.

Key Questions Addressed by Review Initiatives

Some of the key questions that the ECO's litigation rights review initiative could help to answer include:

- What experiences to date has the public had in using these litigation rights?
- Is the use of the *EBR* litigation rights working as envisioned by the *EBR* task force in drafting these rights?
- Are these rights resulting in better environmental decision-making (directly or indirectly)?
- Are there additional measures that could be taken to support the use of these rights?
- Are there unnecessary barriers to using the *EBR* litigation rights?
- Is there a need for better education/public outreach to make people and professionals aware of these rights?

Appendix B

Agenda

AGENDA
EBR LITIGATION RIGHTS WORKSHOP
Thursday, May 25, 2000 9:00 am to 4:00 pm
Temagami Room, Macdonald Block, Queen's Park, Toronto

8:30	Registration	
9:00	Welcome, Purpose of the Meeting, Agenda Review	Joanna Kidd
9:05	Opening Remarks	Commissioner Gord Miller
9:15	Introduction of Participants	
9:30	Overview of *EBR* Litigation Rights and Issues • Q&A	ECO Staff
10:00	Coffee Break	
10:15	"Looking Back, Moving Forward: Six Years of *EBR* Litigation Rights" Panelists: • Jerry DeMarco, Sierra Legal Defence Fund • Doug Hatch, Artemesia Waters Limited • Laura Nemchin, Ontario Ministry of Environment • Linda Pim, Federation of Ontario Naturalists • Rick Lindgren, Canadian Environmental Law Association	
12:00	Lunch	
1:00	Concurrent Break Out Groups • Leave to Appeal #1 • Leave to Appeal #2 • Right to Sue for Harm to a Public Resource • Right to Sue for Public Nuisance and Whistleblower Protection	
2:45	Coffee Break	
3:00	Reports from Break Out Groups	
3:30	Conclusions and Next Steps	Commissioner Gord Miller
4:00	Adjourn	

Appendix C

List of Participants

PARTICIPANT LIST

EBR Litigation Rights Workshop
Sponsored by the Environmental Commissioner of Ontario
Thursday, May 25, 2000 Queen's Park, Toronto, Ontario

Name	Organization
Kirk Baert	McGowan & Associates
Michael Brophy	Ontario Society for Environmental Management
Bryan J. Buttigieg	Miller Thomson
Joseph F. Castrilli	Independent
Karen Clark	Canadian Institute for Environmental Law and Policy
Michael Cochrane LL.B.	Ricketts Harris
Carl Dombek	Environmental Assessment & Appeal Boards
David Donnelly	Canadian Environmental Defense Fund
David Estrin	Gowling, Strathy & Henderson
Mike Fitz-James	Law Times
Charles Ferguson	Inco Limited
Mark Frawley	Environmental Assessment & Appeal Boards
Knox Henry	Environmental Assessment & Appeal Boards
Lee D. Howell	Technical Standards and Safety Authority
John Jackson	Citizens' Network on Waste Management
Tom Liaw	Ministry of Consumer & Commercial Relations
Brennain Lloyd	Northwatch
Duncan Macdonald	Ontario Federation of Labour
Andy Manahan	Council of Ontario Construction Associations
Charlein Mansfield	Ministry of Natural Resources
Barbara Mossop	Ontario Mining Association
Ramani Nadarajah	Canadian Environmental Law Association
Gord Perks	Toronto Environmental Alliance
P. Douglas Petrie	Willms & Shier
Scott Poser	Ministry of Natural Resources
Terry Quinney	Ontario Federation of Anglers & Hunters
Graham Rempe	City of Toronto
Steven Strong	Ministry of Energy, Science & Technology
John Swaigen	Information and Privacy Commissioner of Ontario
Marni Tivey	Ministry of Labour
Mary Ellen Warren	Ministry of Energy, Science & Technology

Panel

Jerry DeMarco	Sierra Legal Defence Fund
Doug Hatch	Artemesia Waters Limited
Rick Lindgren	Canadian Environmental Law Association
Laura Nemchin	Ontario Ministry of Environment
Linda Pim	Federation of Ontario Naturalists

Staff of the Office of the Environmental Commissioner of Ontario

Commissioner Gord Miller

Karen Beattie	Legal Analyst
Maureen Carter-Whitney	Legal Analyst
John Ferguson	Public Education Officer
Joel Kurtz	Senior Policy Advisor
Paul McCulloch	Policy and Decision Analyst
David McRobert	In-House Counsel / Senior Policy Analyst
Mark Murphy	Public Education Officer
Ellen Schwartzel	Research and Resource Centre Coordinator

Workshop Facilitators

Joanna Kidd	Lura Consulting
Greg Jenish	Lura Consulting

Environmental Commissioner of Ontario
1075 Bay Street, Suite 605
Toronto, Ontario M5S 2B1

Phone: (416) 325-3377
Toll-Free: 1-800-701-6454
Fax: (416) 325-3370

E-mail: inquiry@eco.on.ca
Web site: www.eco.on.ca